89-986

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

JULIA A. LUCAS,

Petitioner,

v.

SAMUEL K. SKINNER, Secretary
Department of Transportation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a reviewing court which declines to adopt the district court's subsidiary factual findings leading to the ultimate finding that the plaintiff was not the victim of discrimination under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.*, must reverse and enter judgment in favor of the plaintiff?

(2) In a Title VII case analyzed under the *McDonnell Douglas* paradigm, is the reviewing court permitted to rule against the plaintiff on the ground she failed to introduce evidence of discriminatory animus?

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Petitioner, Julia A. Lucas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 24, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit in the first appeal of this case (App. A) is reported at 835 F.2d 532 (4th Cir. 1987) ("*Lucas I*"). The district court's opinion on remand (App. B) is not reported. The Fourth Circuit's decision on the second appeal, *i.e.*, the subject of this Petition (App. C), is not yet reported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1989, and Petitioner's suggestion for rehearing *en banc* was denied on August 23, 1989. This Court on November 13, 1989 having extended until December 21, 1989 the time in which this Petition may be filed, jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment . . . in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner Julia A. Lucas, a retired employee of the Federal Aviation Administration, Department of Transportation, brought this Title VII action in the United States District Court for the Eastern District of Virginia in 1986. Petitioner, who is white, alleged that the FAA discriminated against her because of her race when it selected for promotion a black employee who lacked an objective qualification for the position. The case was tried in Alexandria, Virginia in February 1987; at the conclusion of petitioner's case the district court involuntarily dismissed on the ground that petitioner had failed to establish a prima facie case of discrimination.

Petitioner and the selectee were competing for a Qualification and Training Specialist position at the FAA's Flight Service Station in Leesburg, Virginia. Petitioner alleged in her Complaint, and respondent admitted in its Answer, that possession of a Pilot Weather Briefing Certificate was a prerequisite to selection for the position. Petitioner claimed that the selectee was unqualified because she lacked this certificate, and that the only reason selectee was promoted

was because of her race. When respondent argued pre-trial that the selectee had outperformed petitioner during an interview, petitioner presented evidence at trial that the interview questions were prohibitively subjective and that her answers in fact were more responsive than the selectee's.

At the close of her case, the trial court dismissed petitioner's claim under Rule 41(b), F.R.Civ.P. The trial court ruled that petitioner had failed to establish a prima facie case because she did not introduce any evidence that race was involved in the selection.

In December 1987, the Fourth Circuit reversed, holding that

> the promotion of an underqualified black, [the selectee], irregular acts of favoritism towards [the selectee], the questionable use of a subjective interviewing process, and the opinion testimony of other employees that race was a factor [in the selection]

were sufficient to establish a prima facie case of discrimination. *Lucas I* (App. A 5a-6a). Accordingly, the Fourth Circuit reversed and remanded for additional proceedings.

At the resumed trial, respondent presented its case, which consisted of testimonial evidence[1] that the selectee was promoted because 1) contrary to its assertion in its Answer, the Pilot Weather Briefing Certificate was not a pre-requisite, and thus the selectee was fully qualified for the position; 2) the selectee performed better in the interviews than petitioner, demonstrating maturity and communication skills; and 3) petitioner had a "confrontative" personality.[2]

The record before the court, however, was inconsistent with that testimony. First, respondent had admitted in its Answer (and had never amended its admission) that the certificate was a requirement for the position. Second, the interviewing officials, who took notes of the actual responses of petitioner and the selectee during the interviews, were unable to explain at trial why they rated the selectee's

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[1] The FAA did not rely upon a single document in this case.

[2] When asked for an example of petitioner's purported "confrontative" personality, the selecting official cited the fact that she questioned her non-selection to the position at issue in this case.

responses higher than petitioner's.[3] Finally, petitioner had received a performance evaluation shortly before the selection, in which her superiors rated her "Above Average" in her ability to handle confrontation.

Nevertheless, the district court held that respondent had not discriminated against petitioner. Relying on the *McDonnell Douglas* analysis, the trial judge found that respondent had rebutted petitioner's prima facie case because the selectee was

> technically fully qualified to assume the responsibilities of the [] position. In addition, [the selectee] possessed maturity and excellent communication skills, which are important for success in a teaching position.
>
> [Petitioner], on the other hand, had a confrontative personality, which would not be desirable in a position requiring the ability to relate well with others.

(App. B at 5b.) The trial judge held that petitioner failed to prove that these reasons were pretextual, and that she thus failed to meet her burden of proving that she was the victim of intentional discrimination.

Petitioner again appealed, arguing that the district court's findings were in conflict with the evidence as a whole and were thus clearly erroneous.[4] Even though the Fourth Circuit failed to affirm any of

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[3] In *Lucas I*, the court of appeals described these interview notes as demonstrating that petitioner's "answers [to the interview questions] were detailed and job specific, while [the selectee's answers] were general and could apply to many jobs." 835 F.2d at 533 (App. A at 2a).

[4] Specifically, petitioner argued that 1) the FAA had admitted in its Answer that the certificate was a requirement for the position; 2) the respondent's inability to explain their ratings of the candidates in the interviews failed to satisfy the requirement that they offer a sufficiently clear explanation of a legitimate non-discriminatory reason; and 3) the trial judge's finding to the contrary notwithstanding, petitioner had been evaluated "Above Average" by her immediate and second-level supervisors in April 1985 specfically on her ability to "effectively handle conflict or confrontation" and her ability to "promote a harmonious atmosphere among associates, subordinates, and supervisors", and she received from her supervisors an overall evaluation of "outstanding" in September 1985, the period during which the trial judge found she was "confrontative". Moreover, the trial judge's finding to the contrary notwithstanding, the official upon whose testimony the trial judge relied for his finding that

the factual findings of the district court,[5] the court of appeals nevertheless affirmed the ultimate finding against petitioner because she "failed to carry [her] burden . . . of demonstrating that [respondent's] actions were racially motivated". (App. C 7c.) The court based this conclusion solely on its observations that, while some employees testified that selections at the facility were based on race, others testified to the contrary, and that another white employee was rated higher than petitioner after the interviews, though this white employee was similarly not offered the position. *Id.* The court did not further discuss testimony by the selecting officials that they were looking for "minority types" (App. C 3c.), and other evidence that they were motivated by "Affirmative Action" concerns.

REASONS FOR GRANTING THE PETITION

1. This case raises the question, hitherto not specifically addressed by the Court in any of its decisions explaining the *McDonnell Douglas*[6] paradigm, whether the plaintiff must prevail if the court refuses to credit the reasons advanced by the defendant during his rebuttal. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 718 (1983) (Blackmun, J., concurring). It is settled that the failure of the defendant to articulate its reasons in the face of a prima facie case must result in judgment for the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). It is also settled that, if the defendant does articulate its reasons, the plaintiff retains the opportunity to demonstrate that those reasons are "unworthy of credence". *Id.* at 256; *Aikens, supra*, 460 U.S. at 716.

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petitioner had a "confrontative" personality *actually* testified that he in fact "didn't know" how she would react in any particular situation. Finally, one of the officials responsible for the selection testified at trial that the selectee (who is black) had an advantage in his mind because she had previously worked with "minority types".

[5] The Fourth Circuit held that, in light of respondent's unamended admission that the Pilot Weather Briefing Certificate was a pre-requisite to selection, the trial court's finding to the contrary was clearly erroneous. (App. C at 4c.) In addition, because it was concerned with "the strength of the evidence" (*id.* 7c.), the Fourth Circuit did not adopt the trial court's findings that the selectee demonstrated maturity during the interview or that the petitioner had a "confrontative" personality.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

If the lower court refuses to credit the defendant's reasons, there is no principled reason why the court should not therefore be required to rule in favor of the plaintiff. *See Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1235-36 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985). The articulation by a defendant of a palpably untrue reason, which the court cannot credit, ought not place him in any better position than if he had articulated no reason at all.

Moreover, in affirming the judgment of the district court, the decision below conflicts with decisions of other courts insofar as the affirmance was based on reasons not advanced by the defendant or the district court. *See Lanphear v. Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983) ("court's substitution of a reason of its own devising for that proffered by appellees runs directly counter to the shifting allocation of burdens"); *Commons v. Montgomery Ward & Co.*, 614 F.Supp. 443, 448 (D.Kan. 1985). While the court of appeals must affirm the district court if its findings are not clearly erroneous, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985), if the reviewing court cannot accept those findings it also cannot, consistently with *McDonnell Douglas*, enter judgment for the defendant on the basis of facts not found by the district court or advanced at trial.

The ultimate issue under Title VII is whether the defendant intentionally discriminated against the plaintiff. A prima facie case gives rise to an inference of intentional discrimination because, as the Court has observed, "we know from our experience that more often than not people do not act in a totally arbitrary manner, without underlying reasons, especially in a business setting." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). All the defendant need do in the face of a prima facie case is provide evidence of his underlying reasons. *Burdine, supra*, 450 U.S. at 254-55. While the defendant does not shoulder the burden of proving that his proffered reasons are his real reasons, *id.*, if the court cannot accept those reasons as credible the defendant cannot possibly have rebutted the inference that his "actions were bottomed on impermissible considerations." *Furnco, supra*, 438 U.S. at 579-80.

In affirming the district court in this case, the court of appeals has ignored these principles. The court of appeals rejected outright one of the district court's factual findings (that the certificate was not

required), and declined to rest its affirmance on the district court's other two factual findings (*i.e.*, that the selectee was fully qualified and that petitioner had a "confrontative" personality). Accordingly, the court of appeals, which could not affirm *any* of the district court's findings of fact, was required to find petitioner's prima facie case unrebutted and enter judgment in her favor. *Aikens, supra*, 460 U.S. at 718 (Blackmun, J., concurring).

Because the question of pretext is the pivotal question in so many cases arising under Title VII, exposition of that portion of the *McDonnell Douglas* analysis is clearly warranted.

2. The court of appeals affirmed the district court based on its finding that petitioner "failed to carry [her] burden" of "demonstrating that the FAA's actions were racially motivated." (App. C 7c.) In analyzing that burden, however, the court of appeals impermissibly weighed "the FAA's evidence on the issue of racial motivation", which consisted of the testimony of some employees, against petitioner's "evidence on this issue", which consisted of testimony by other employees. (App. C 7c.)

The evaluation of direct evidence of discriminatory animus, of course, plays absolutely no role in the *McDonnell Douglas* paradigm. The Court has repeatedly explained that an employee may demonstrate pretext "*either directly* by persuading the court that a discriminatory reason more likely motivated the employer", "*or indirectly* by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra*, 450 U.S. at 256 (emphasis added), citing *McDonnell Douglas, supra*, 411 U.S. at 804-805. The standard is clearly stated in the alternative; it has never been suggested that a plaintiff could demonstrate pretext *only* by introducing evidence of discriminatory motive. To insist on such proof is to eviscerate the analysis entirely and constitutes clear legal error. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent"), citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) ("the *McDonnell Douglas* formula does not require direct proof of discrimination").[7]

[7] In support of its holding that petitioner was not discriminated against because of her race, the court of appeals cited the fact that a white male, though also not offered

In light of the recurring question of the precise nature of the pretext phase of the *McDonnell Douglas* analysis, as well as the court of appeals' clear error when it imposed on petitioner the burden of producing direct evidence of discriminatory motive, review by the Court is clearly warranted.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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the position, "was one of the four top candidates considered". (App. C at 7c.) It is unclear why an allegation of discrimination by one candidate is considered to be rebutted by the respondent's refusal to offer the position to yet another candidate of the same race.

APPENDIX A

United States Court Of Appeals For The Fourth Circuit

No. 87-2553

Julia Lucas,

Plaintiff-Appellant,

versus

Elizabeth Dole, Secretary
of Transportation,

Defendant-Appellee.

Before WIDENER, MURNAGHAN
and ERVIN, Circuit Judges.

Argued: October 7, 1987
Decided: December 23, 1987

ERVIN, Circuit Judge:

Appellant Julia Lucas challenges the dismissal of her Title VII[1] job discrimination suit. Lucas, a white woman, argues that she was the victim of reverse discrimination when Rosa Wright, a less qualified black woman, was promoted to the Quality Assurance and Training Specialist position. At the close of Lucas' case, Judge Hilton granted the government's motion for dismissal under Federal Rule of Civil Procedure 41(b), finding that she did not make out a prima facie case. This appeal follows. We reverse and remand.

[1] 42 U.S.C. 2000e et seq.

Julia Lucas and Rosa Wright work for the Federal Aviation Administration (FAA). Both women applied for Quality Assurance and Training Specialist (QATS) positions at the Flight Service Station at Leesburg, Virginia. The FAA's Eastern Regional Personnel Office determined that nineteen applicants, including Lucas and Wright, were qualified for the two available QATS positions. Two local managers interviewed eighteen of the applicants,[2] rating them based on their answers to five questions. They referred the top four[3] to the selecting official, Edward Dietz. Dietz selected Wright and Sharon Hall, two of the four. Lucas scored well below Wright and was not considered by Dietz.[4]

Although the personnel office determined that all nineteen applicants were qualified, Wright did not have a current Pilot Weather Briefing Certificate at the time of her selection, a QATS job requirement.[5] At trial, Lucas presented other evidence in order to show discrimination. She testified to the subjective nature of the interviewing process, which consisted of five broad questions concerning the QATS position. She presented evidence that her answers were detailed and job specific, while Wright's were general and could apply to many jobs. Evidence also showed that in July 1985, Wright was given a temporary assignment involving education and training of students learning about the air traffic control system. The temporary position was not advertised to other workers in the usual way, and Wright was selected before some workers knew of the opening. Five other employees also testified that race may have been a factor in the selection of Wright and in other situations at the Leesburg facility. Favoritism there had helped create poor labor-management relations, although it is not clear whether the favoritism was racially motivated.

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[2] One applicant withdrew voluntarily after getting another job.

[3] The top four scorers were three black females, including Wright, and a white male.

[4] In her testimony, Lucas admitted that she scored in the bottom third among the interviewees, and that those above her included blacks, whites and Hispanics. Joint Appendix at 117-18.

[5] Both parties agreed that a current certificate was a job requirement. Wright had been certified in the past, although her certification had expired. She was recertified shortly after assuming the QATS position.

Finally, she compared her own experience and qualifications with those of Wright.

At the close of Lucas' evidence, the trial court dismissed her claim under Rule 41(b).[6] He found no evidence that race was involved in the promotion and ruled that Lucas failed to establish a prima facie case.

I.

A plaintiff can establish a prima facie case of disparate treatment by direct or indirect evidence of discrimination, or under the *McDonnell Douglas*[7] framework. *See Holmes v. Bevilacqua*, 794 F.2d 142, 146 (4th Cir. 1986) (en banc). To establish a prima facie case under *McDonnell Douglas*, a plaintiff must show (1) she is a member of a protected group; (2) she applied and was qualified for a job that was open; (3) she was rejected, and (4) the job remained vacant. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. The prima facie case creates an inference that unlawful discrimination was the reason for the employment action. To rebut this inference, the employer must "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* The plaintiff has the opportunity to show

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[6] Rule 41(b) states:

> (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

[7] *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

that the stated reason is a mere pretext for a racially motivated decision. *Id.* at 804, 93 S.Ct. at 1825. Within this framework the ultimate burden of persuasion remains on the plaintiff to prove intentional discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215 (1981).

The present case differs from *McDonnell Douglas* in that the position did not remain open after Lucas' rejection. This court has stated that the inference of discrimination is weakened by this fact, and that a plaintiff like Lucas must produce "some other evidence that [her] race was a factor considered by [her] employer in not granting [her] the promotion." *Holmes*, 794 F.2d at 147.

The present case also involves "reverse discrimination"; a member of the white majority is alleging racial discrimination.[8] The Supreme Court has held that Title VII protects whites as well as minorities. *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1975). Although the D.C. Circuit has imposed a higher prima facie burden on majority plaintiffs, we expressly decline to decide at this time whether a higher burden applied.[9] The similarity of the burden imposed under *Holmes* and that imposed by the D.C. Circuit in reverse discrimination cases makes it unnecessary to reach this issue in this case.

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[8] Although this is a reverse discrimination case, it does not involve an affirmative action plan implemented because of past discrimination.

[9] The D.C. Circuit has applied a higher standard in reverse discrimination cases because "it defies common sense to suggest that the promotion of a black employee justified an inference of prejudice against white co-workers in our present society." *Parker v. Baltimore & O. R.R.*, 652 F.2d 1012, 1016 (D.C.Cir. 1981). Generally a white plaintiff must show "background circumstances" that support the suspicion that defendant is "that unusual employer who discriminates against the majority." *See Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983); *Parker*, 652 F.2d at 1016; *Machakos v. Meese*, 647 F.Supp. 1253, 1262 (D.D.C. 1986). Another formulation requires whites "to offer other particularized evidence, apart from their race or sex, that suggests some reason who an employer might discriminate against them." *Bishopp v. District of Columbia*, 788 F.2d 781, 787 (D.C. Cir. 1986). This higher standard can be met in a variety of ways. *See Bishopp*, 788 F.2d at 787-88 (defendant promoted less qualified minority employee; use of subjective, rather than objective criteria; internal and external pressure to favor minorities); *Lanphear*, 703 F.2d at 1315 (qualified white passed over for black whose qualifications were not checked;

II.

Lucas satisfies the basic requirements of *McDonnell Douglas*, except that the job did not remain open. She is a member of a protected group, whites; she applied and was qualified for the QATS position; and she was rejected. Because the job did not remain open, she was required to produce, under *Holmes*, some other evidence that race was a factor. In *Holmes*, the use of a subjective interviewing process in promotion of a "very well qualified" candidate did not satisfy the standard. 794 F.2d at 147. In applying its similar standard in reverse discrimination cases, the D.C. Circuit has considered the promotion of a less qualified employee, the use of subjective criteria, and irregular acts of favoritism towards minority employees. *See Bishopp v. District of Columbia*, 788 F.2d 781, 787-88 (D.C. Circuit 2986); *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Circuit 2983); *Machakos v. Meese*, 647 F.Supp. 1253, 1262 (D.D.C. 1986). Lucas showed more than the mere use of subjective criteria, including the promotion of an underqualified black, Wright, irregular acts of

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pressure to increase minority percentages); *Machakos*, 647 F.Supp. at 1262 (irregular acts of favoritism toward minority employees; racial disproportionality in promotions; pressures to increase percentages of minority employees). Direct evidence of discriminatory intent is not required, although it would obviously strengthen a plaintiff's case. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 103 S.Ct. 1478, 1481 n.3, 75 L.Ed.2d 403 (1983); *Teamsters v. United States*, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866 n.44, 52 L.Ed.2d 396 (1977); *Warren v. Halstead Indus.*, 802 F.2d 746, 752 (4th Cir. 1986).

Other Courts have refused to apply a higher burden in reverse discrimination cases. They have relied on the language used by the supreme Court in *McDonald*, and the spirit of equality underlying Title VII. In *McDonald*, the Supreme Court held "that Title VII prohibits racial discrimination against the white petitioners in the case upon the same standards a would be applicable were they Negroes ... ." 427 U.S. at 280, 96 S.Ct. at 2579. In *McDonald*, the Court found a violation when a company took harsher disciplinary actions against two whites than it took against a black involved in the same conduct. Since then, several courts have invoked the broad "same standards" language used in *McDonald*. *See e.g. Daye v. Harris*, 655 F.2d 258, 262 n.11 (D.C.Clr. 1981) ("That she is white is no impediment to the suit; white employees are protected by Title VII." The court found the plaintiff had established her prima facie case, and did not need to present direct evidence of racial motivation); *Butta v. Anne Arundel County*, 473 F.Supp. 83, 86 (D.Md. 1979) (Title VII prohibits discrimination against whites, and "the same standards are applicable." Plaintiff made out a prima facie case as a member of a protected class, whites).

favoritism toward Wright, the questionable use of a subjective interviewing process, and the opinion testimony of other employees that race was a factor. This evidence satisfied the "some other evidence" standard of *Holmes* and establishes a prima facie case.

Because she made out a prima facie case, the district court erred in granting the employer's Rule 41(b) motion.

REVERSED AND REMANDED

APPENDIX B

United States District Court

FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JULIA A. LUCAS

Plaintiff

v.

JAMES H. BURNLEY, IV,
U.S. Secretary of Transportation
in his official capacity,

Defendant.

CA No. 86-0743-A

This case comes before the Court on remand of the United States Court of Appeals for the Fourth Circuit, *Lucas v. Dole,* 835 F.2d 532 (4th Cir. 1987), wherein the Court determined that plaintiff had made out a prima facie case of racial discrimination. It, therefore, became incumbent upon the defendant to articulate some legitimate, nondiscriminatory reason for its action in order to rebut the inference of unlawful discrimination. Plaintiff then would have the opportunity to show that the stated reason was a mere pretext for a racially motivated decision.

The Court, having heard evidence on defendant's showing of a legitimate nondiscriminatory reason for its action and on plaintiff's showing that the reason articulated was a pretext for intentional discrimination, now makes the following findings of fact and conclusions of law, pursuant to Rule 52, Federal Rules of Civil Procedure

FINDINGS OF FACT

1. Plaintiff is a white female employee of defendant Federal Aviation Administration (FAA).

2. Plaintiff was one of nineteen FAA employees who applied for two QATS (Quality Assurance and Training Specialist) positions at the FAA's Leesburg, Virginia facility, pursuant to an FAA vacancy announcement which opened on June 12, 1985.

3. An unrated and unranked list of the eligible applicants was compiled and referred by the personnel office for FAA's Eastern Region to the manager of the Leesburg facility for consideration. The personnel office of the FAA's Eastern Region determined that all of the candidates for the QATS positions were fully qualified, and this determination was relied upon by the manager of the Leesburg facility, Edward J. Dietz, Jr., (a white male).

4. Possession of a current Pilot Weather Briefing Certificate was not a prerequisite for application for the position or selection for the position.

5. As part of the selection process, Mr. Dietz, the manager of the Leesburg automated flight service station, created an interview panel consisting of Kenneth Johnson, assistant air traffic manager, and Gary Wilson, assistant manager for training and the immediate supervisor of the QATS position. Mr. Johnson (a black male) and Mr. Wilson (a white male) jointly interviewed all nineteen candidates including the plaintiff. Mr. Dietz did not interview any of the candidates for the QATS position.

6. The QATS position is essentially a teaching position, and therefore, a candidate's maturity, ability to communicate, and ability to relate to others are important considerations in the selection process.

7. During the interviews, Mr. Johnson and Mr. Wilson asked each candidate a total of five questions, and separately scored the answers given. The questions were designed to determine both a candidate's technical qualifications and teaching skills.

8. Following each interview, Mr. Johnson and Mr. Wilson discussed the answers given by the candidate in light of the requirements of the QATS position and the qualities considered to be important for the job. These discussions sometimes resulted in the revision of a score on a particular answer by one or both of the interviewers.

Revisions were made both to increase and to decrease the score given and were made with regard to several of the candidates.

9. Each individual point total on the interview score sheet was multiplied by three to get a total interview score. Plaintiff received a total interview score of thirty-nine (39) out of a possible seventy-five from each of the interviewers. At least half of the other eighteen applicants received higher interview scores than the plaintiff.

10. After completing all of the interviews, Mr. Johnson and Mr. Wilson submitted to Mr. Dietz the names of the four candidates who had received the highest interview scores. The top four candidates for the two QATS positions were Robert Chapman (a white male), Sharon Hill (a black female), and Rosa Wright (a black female). The plaintiff was not among the top four or even the top six candidates.

11. Mr. Dietz questioned Mr. Johnson and Mr. Wilson as to their reasons for considering these four individuals to be the top candidates and as to how close their scores were to candidates five and six.

12. After discussing the four recommended candidates with Mr. Johnson and Mr. Wilson and reviewing the credentials of each candidate, Mr. Dietz selected Sharon Hall and Rosa Wright to fill the two QATS positions.

13. Mr. Johnson debriefed the unsuccessful candidates, including the plaintiff, to provide them with information concerning how they could improve their chances for selection for future vacancies. Plaintiff later approached Mr. Dietz to question why she was neither selected nor one of the top four candidates. Mr. Dietz informed her that she needed to address the quality of her answers to the questions posed in the interviews in the future and that she needed to develop the ability to function in a teaching type of atmosphere where she would be confronted by widely differing students and student attitudes since the QATS position was essentially that of a teacher. Mr. Dietz informed plaintiff that her personality was confrontive and that she would not perform well as a teacher.

14. Sharon Hall, a black female, was selected for one of the two QATS positions. No complaint about her selection has been made.

15. Rosa Wright, a black female, was selected for the second of the two QATS vacancies.

(a) Ms. Wright was a full performance level ATC at the time she was selected for the QATS position.

(b) Ms. Wright was checked out on the pilot weather briefing function of her position at the Leesburg facility on December 4, 1984, following her return to FAA as an employee.

(c) She met all of the requirements for application and selection for the QATS position for which she was selected and which has given rise to this action.

(d) Ms. Wright was recertified with regard to the Pilot Weather Briefing Certificate within sixty days of her selection for the QATS position.

(e) Mrs. Wright's selection for the QATS position violated no FAA or Office of Personnel Management regulations.

16. Race was not a factor in the selection of Mrs. Wright.

17. Ms. Wright was selected for the QATS position because of her experience, maturity, and ability to relate to others.

CONCLUSIONS OF LAW

1. This is an action by the plaintiff, Julia A. Lucas, alleging that she was the victim of reverse discrimination when Rosa Wright, a less qualified black woman, was selected in lieu of plaintiff, a white woman, for a QATS position at FAA's Leesburg facility.

2. This Court has jurisdiction over this action, pursuant to 42 U.S.C. 2000 *et seq.*, Title VII of the Civil Rights Act of 1964, as amended.

3. In order to prevail in a disparate treatment action brought under Title VII of the Civil Rights Act, the plaintiff has the initial burden of establishing a prima facie case under the *McDonell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The prima facie case creates an inference that unlawful discrimination was the reason for the employment action. The burden then shifts to the employer to rebut this inference by articulating "some legitimate nondiscriminatory reason for its action." *Id.* The plaintiff, then, has an opportunity to show by a preponderance of the evidence that the stated reason is pretextual. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248

(1981). The ultimate burden of persuasion remains on the plaintiff to prove intentional discrimination. *Id.*

4. This case is before the Court on remand by the United States Court of Appeals for the Fourth Circuit. *Lucas v. Dole*, 835 F.2d 532 (4th Cir. 1987). The Court of Appeals held that the plaintiff had established a prima facie case. Therefore, this Court heard evidence on defendant's "legitimate nondiscriminatory reason" for its action and on plaintiff's rebuttal evidence to demonstrate pretext.

5. Defendant has articulated legitimate nondiscriminatory reasons for selecting Rosa Wright instead of plaintiff for the Quality Assurance and Training Specialist (QATS) position in question. Ms. Wright was technically fully qualified to assume the responsibilities of the QATS position. In addition, Ms. Wright possessed maturity and excellent communication skills, which are important for success in a teaching position.

Ms. Lucas, on the other hand, had a confrontive personality, which would not be desirable in a position requiring the ability to relate well with others.

6. Plaintiff has failed to present any evidence that defendant's reasons for selecting Rosa Wright were pretextual. Plaintiff's non-selection for the QATS position was not based upon prohibited discrimination on the basis of her race.

An appropriate order shall issue.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
April 12, 1988

United States District Court

FOR THE

EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JULIA A. LUCAS

Plaintiff

v.

JAMES H. BURNLEY, IV,
U.S. Secretary of Transportation
in his official capacity,

Defendant.

ORDER

Pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby

ORDERED that judgment is entered in favor of the defendant.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
April 12, 1988

APPENDIX C

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

No. 88-2807

Julia Lucas,

Plaintiff-Appellant,

versus

James H. Burnley, IV,
Secretary of Transportation,

Defendant-Appellee.

Argued: February 6, 1989
Decided: July 24, 1989

Before ERVIN, Chief Judge, and
WIDENER and MURNAGHAN, Circuit Judges.

ERVIN, Chief Judge:

Appellant Julia Lucas challenges the district court's decision against her in a Title VII[1] employment discrimination action she brought against her employer, the Federal Aviation Administration. Ms. Lucas, who is white, alleges that her employer engaged in racial discrimination when it promoted Rosa Wright, a less qualified black, to the position of Quality Assurance Training Specialist. Following a bench trial, the district court found in favor of the government, on the grounds that it had articulated a legitimate, nondiscriminatory reason for its selection of Ms. Wright, and that appellant had failed to demonstrate that this reason was pretextual. While we hold that the

[1] 42 U.S.C. § 2000e *et seq.*

district court erred in making some of its findings of fact, we affirm on the merits.

Lucas and Wright, who work for the Federal Aviation Administration ("FAA"), both applied for a Quality Assurance and Training Specialist ("QATS") position at the Flight Service Station ("FSS") in Leesburg, Virginia. A total of nineteen people applied for two such positions. Two local managers at the Leesburg facility, Gary Wilson and Ken Johnson, selected four finalists for the jobs on the basis of personal interviews they conducted with all but one of the applicants.[2] Edward Dietz, the manager at the facility, made the final selections, and he chose Ms. Wright and Sharon Hall.

At trial Ms. Lucas presented evidence that Wright did not have a current Pilot Weather Briefing ("PWB") Certificate at the time of her selection. Such a certificate is a requirement for the QATS position. Lucas also presented evidence demonstrating the subjective nature of the interview process, as well as the fact that Wright had, in the past, been given preferential treatment by the Leesburg management. Appellant also presented the testimony of five other Leesburg employees, who stated that race could have been a factor in Ms. Wright's selection.

Following the presentation of Lucas' case, the trial court granted the government's Rule 41(b) motion for dismissal, finding that Ms. Lucas had not established a *prima facie* case. Lucas appealed, and we reversed and remanded for trial. *Lucas v. Dole*, 835 F.2d 532 (4th Cir. 1987) (*Lucas* I). Specifically, we found that Ms. Lucas had established a prima facie case of racial discrimination because she had introduced evidence showing: (1) the promotion of an unqualified black (Wright); (2) irregular acts of favoritism toward Wright; (3) the questionable use of a subjective interviewing process; and (4) the opinion testimony of other employees that race wa sa factor. 835 F.2d at 534.

Following remand the trial resumed and the government presented its evidence. That evidence included the testimony of Patricia Reilly, a personnel staffing specialist in the FAA's Eastern regional personnel office, who drew up the vacancy announcement

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[2] One applicant withdrew voluntarily after getting another job.

for the QATS' openings. Ms. Reilly testified that possession of a current PWB certificate was not a requirement for the QATS position. The vacancy announcement, which listed the minimum requirements for the job, made no reference to a PWB certificate. Ms. Reilly cited FAA Order 330.1A as support for her testimony that the lack of a PWB certificate could be cured within sixty days after an employee was selected for a QATS position. The government did not introduce this order into evidence.

Ms. Reilly's testimony concerning the possession of a PWB certificate as a prerequisite for a QATS position directly contradicted an earlier admission made by the FAA in its answer to Ms. Lucas' complaint.

The government also presented the testimony of Edward Dietz, Gary Wilson and Ken Johnson, as evidence that the FAA had a legitimate, nondiscriminatory reason for promoting Ms. Wright rather than Ms. Lucas. Dietz had been the manager at the Leesburg facility since May, 1985, and he was responsible for making the final selections to fill the QATS openings. Johnson was Dietz's deputy, and Wilson was the Assistant Manager for Training at the Leesburg facility.

Wilson and Johnson's testimony essentially established that the interview process was entirely subjective, and that their rankings o the candidates was based solely on those interviews. Even after reviewing their notes taken at those interviews, neither Wilson nor Johnson could explain why he had given Ms. Wright higher scores than Ms. Lucas. Additionally, Wilson testified that he had recommended Ms. Wright to Dietz for an initial temporary assignment to the QATS position because "she had experience instructing people to take the ATC exam, mostly minority types."

Dietz's testimony established that the believed the ability to maintain "interpersonal relationships" was the most important qualification for the QATS job, and that he had communicated this to Wilson and Johnson. He also stated that he felt Ms. Lucas had a confrontational personality, and that she would not fare well as an instructor. Additionally, Dietz testified that Ms. Wright's performance during her temporary assignment subconsciously entered into his decision to select her to fill the position permanently.

Both parties also introduced evidence concerning the racial environment at Leesburg. The government's witnesses, Suk and Herrall, testified that they were unaware of any favoritism towards blacks at the facility. Mr. Hamm, one of the appellant's witnesses, testified that white employees were often passed over for promotion in favor of less qualified blacks. Hamm felt this resulted from the fact that EEO concerns were taking precedence over operational considerations. He had previously met with evaluators from FAA headquarters to express his concern over this fact. Appellant's second witness, Mr. Maisal, testified that management was "cognizant" of race when it made promotions.

I. The PWB Certificate

Paragraph 10 of Ms. Lucas' complaint asserted:

> A prerequisite to selection for a QATS position is possession of a current Pilot Weather Briefing Certificate from the Department of Commerce. The certificate lapses, and must be renewed, if the employee performs no related duties for one year.

The FAA admitted this assertion in paragraph ten of its answer.

In *Lucas I*, this court noted that "both parties agreed that a current certificate was a job requirement." 835 F.2d at 533 n.5. Thus, evidence of Ms. Lucas' *prima facie* case included "the promotion of an underqualified black." *Id.* at 534.

The FAA handbook provides support for the conclusion that the QATS position requires a PWB certificate. That handbook states that "FSS personnel shall obtain a certificate of authority from the [National Weather Service] before performing ... [a] Pilot weather briefing." The handbook further mandates that the certificate must be renewed by means of an oral examination if the certified employee performs no briefing duties for more than a year. As best we can tell from the record, the QATS position includes briefing duties.

Despite this evidence the district court specifically found as fact that a PWB certificate is not a requirement for selection to the QATS job, and that Ms. Wright was fully qualified, even though she lacked a certificate. We reverse this finding because it is clearly erroneous.

The general rule is that "a party is bound by the admissions of his pleadings." *Best Canvas Products & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983). *See also Action Manufacturing, Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164, 165 (1st Cir. 1986); *PPX Enterprises, Inc. v. Autofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980) ("under federal law, stipulation and admissions in the pleadings are generally binding on the parties and the Court."); *State Farm Mutual Automobile Inc. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968) ("... judicial admissions are binding for the purpose of the case in which the admissions are made including appeals."). The FAA attempts to counter this standard rule by invoking Fed. R. Civ. Pro. 15(b), which provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleading. Such amendment of the pleadings as may be necessary to cause then to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of those issues.

We decline, however, to apply Rule 15(b) to void the effectiveness of the FAA's judicial admissions. First, the plain language of 15(b), which speaks of "issues not raised by the pleadings", precludes the rule's application in this case. The certificate requirement was not only raised by the pleadings, it was admitted and therefore resolved by those pleadings. We fail to see how Rule 15(b) applies to the question of whether a judicial admission is binding.

Additionally, we find questionable the FAA's assertion that the certificate requirement issue was tried by the "implied consent" of the parties. The government claims that Lucas "reopened" this issue by introducing evidence to prove it. Appellee, therefore, was entitled to introduce evidence disproving the existence of a certificate requirement. The evidence introduced by Ms. Lucas and cited to by the FAA, however, all goes to the question of whether Ms. Wright was qualified for the QATS position.[3] Ms. Lucas introduced no evidence directly

[3] We note that in its answer, the FAA had denied appellant's allegation that Ms. Wright was not qualified for the position.

addressing the question of whether a PWB certificate is required for a QATS position. Appellant's evidence concerning Ms. Lucas' qualifications should not be viewed as reopening the question of whether the QATS jobs require PWB certificates.

Finally, we reject the blanket rule that the government urges us to adopt, that a failure to object to evidence[4] constitutes implied consent to try an issue already admitted in the pleadings. *See Stacy v. Aetna Casualty & Surety Co.*, 484 F.2d 289, 294 (5th Cir. 1973) (Holding that the failure to oppose the introduction of evidence at variance with a judicial admission resulted in the admission being amended out of the pleadings pursuant to Rule 15(b).) It seems to us, however, that had the Federal Rules been intended to make the binding nature of a judicial admission so easily waivable, they would certainly contain a much more explicit provision than 15(b).

II. The Disparate Treatment Claim

Once a plaintiff in an action such as this has established a prima facie case, an inference arises that unlawful discrimination was the reason for the employment action. *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 688 (1973). The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* The plaintiff then has the opportunity to show that the stated reason is a mere pretext for a racially motivated decision. *Id.* at 804, 93 S. Ct. at 1285. Within this framework the ultimate burden of persuasion remains on the plaintiff to prove intentional discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

At trial the FAA argued that in selecting an individual to fill the QATS position its primary concern was to find someone with both the experience and the personal qualities necessary to be a successful teacher. Ms. Lucas, they asserted, lacked teaching experience and exhibited a "confrontational personality". Judge Hilton accepted

[4] In this case the evidence was the testimony of Ms. Reilly that a PWB certificate was not a requirement for *Selection* to the QATS position. We again note, however, that the government failed to introduce into evidence the FAA order which allegedly supported this testimony.

these argument,s finding that the FAA had articulated a legitimate, nondiscriminatory reason for selecting Ms. Wright because she was

> technically fully qualified to assume the responsibilities of the QATS position. In addition, Ms. Wright possessed maturity ad excellent communication skills, which are important for success in a teaching position.
>
> Ms. Lucas, on the other hand, had a confrontative personality, which would not be desirable in a position requiring the ability to relate well with others.

While we are somewhat concerned about the strength of the evidence supporting this conclusion, we nonetheless affirm the judgment in favor of the FAA. We again note that Ms. Lucas had the burden of demonstrating that the FAA's actions were racially motivated. *See Burdine, supra*. The record establishes that she failed to carry that burden. Appellant's evidence on this question consisted of the testimony of Johnson, Maisal, Terry and Hamm. Johnson testified that he recommended to Dietz that Wright be named to the temporary QATS position because "she had experience instructing people to take the ATC exam, mostly minority types." Maisal, Terry and Hamm were all employees at Leesburg. Maisal testified that he thought Ms. Wright's selection was based in part on race. Terry testified that Wright was *not* selected because she was black. Hamm testified that minority candidates would often be selected for positions at Leesburg even though there were other, nonminority, applicants who were more qualified.

The FAA's evidence on the issue of racial motivation included the testimony of Suk and Herrell, two more Leesburg employees. Both men rebutted the assertions that there was an air of racial favoritism at Leesburg. Appellee also demonstrated that a white male without a PWB certificate was one of the four top candidates considered by Dietz. He ultimately was not selected because of the time it would have taken to transfer him from another facility.

Finally, the FAA presented evidence that when making selections for the temporary QATS position, it needed someone immediately. They attempted to find a list of employees who had volunteered for or requested such work, but none could be found. There existed no formal procedures either for compiling such a list or dictating how

a selection should be made. Dietz therefore relied on the recommendation of his assistant, Ken Johnson. Johnson recommended Wright primarily because she had prior experience, and they did not have time to train people. There is no evidence in the record that Leesburg had employees other than Ms. Wright with such experience.

In light of all this evidence, we concur in the district court's finding that "[p]lain'iff's nonselection for the QATS position was not based upon prohibited discrimination on the basis of her race," and this factual finding cannot be said to be clearly erroneous.

The judgment in favor of the FAA is hereby

AFFIRMED